



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ADVANCED LITIGATION, LLC,
a Delaware limited liability company,

Plaintiff,

v.

JEFFREY Z. HERZKA and
W. BYRON POLAND,

Defendants.

Civil Action No. 19789

JEFFREY Z. HERZKA,

Counterclaimant,

v.

ADVANCED LITIGATION, LLC,
SCOTT CHRISTENSEN and
JENNIFER CHRISTENSEN,

Counterdefendants.

MEMORANDUM OPINION

Submitted: April 12, 2006

Decided: August 10, 2006

Teresa A. Cheek, Esquire, Margaret M. DiBianca, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware, *Attorneys for Defendant and Counterclaimant Jeffrey Z. Herzka*

Richard H. Cross, Jr., Esquire, Erica Niezgoda Finnegan, Esquire, CROSS & SIMON, LLC, Wilmington, Delaware, *Attorneys for Counterdefendants Scott Christensen and Jennifer Christensen*

PARSONS, Vice Chancellor.

This action is before the Court on Defendant/Counterclaimant Jeffrey Z. Herzka's motion for summary judgment. Plaintiff, Advanced Litigation, LLC ("AL"), filed this action on July 30, 2002 for misappropriation of trade secrets and conversion, among other things. Herzka later filed a counterclaim against AL and a third party complaint against Scott Christensen for breach of contract, unjust enrichment and violation of the Delaware Wage Payment and Collection Act.¹

On July 29, 2005, the Court granted Defendants' motion for dismissal of the claims of AL against Defendants and for entry of judgment against AL on Herzka's counterclaim on the ground that AL voluntarily abandoned its positions (the "July Order"). On August 8, 2005, Defendants amended their Answer and Counterclaims to add Christensen's wife, Jennifer Christensen, as a defendant on the counterclaims. Herzka now seeks summary judgment on his counterclaim against each of the Christensens individually for wages earned and business expenses disbursed on AL's behalf, based in part on the July Order. For the reasons stated the Court denies Herzka's motion.

I. BACKGROUND

A. Facts

AL provides document imaging, indexing and trial presentation support services to lawyers and others involved in litigation. AL started out of the Christensens' residence in

¹ 19 *Del. C.* §§ 1101-1115 ("DWPCA").

2000, but moved to an office in Essington, Pennsylvania in late January 2002.² Christensen served as AL's sole member and owner until December 20, 2002, when he signed a merger agreement with Aztec Copies, LLC.³ AL employed Mrs. Christensen (who had training and experience as a medical administrator) as its bookkeeper from mid 2000 until December 20, 2002.⁴ It paid her \$52,000 per year.

Throughout AL's existence Mrs. Christensen had check-signing authority and routinely prepared and signed AL checks.⁵ In fact, Mrs. Christensen had enough discretion and authority over AL's checking account that she was able to use AL funds to pay her family's household and personal expenses.⁶ Mrs. Christensen's duties at AL included recording expenses and entering information about new employees. Specifically, she would enter information about hours and expenses provided by all AL employees, including Herzka, into the QuickBooks® database, generate and sign paychecks, pay other AL expenses and balance AL's accounts.⁷ Christensen relied on

² J. Christensen Dep. at 27-28. Both Jennifer and Scott Christensen were deposed. Their depositions are cited as "J. Christensen Dep." and "S. Christensen Dep.," respectively.

³ S. Christensen Dep. at 295-97. The parties dispute, however, whether a merger actually occurred.

⁴ J. Christensen Dep. at 27.

⁵ *Id.* at 24, 28-29.

⁶ *Id.*

⁷ *Id.* at 30-36, 55-56, 76-77.

Mrs. Christensen's judgment regarding the timing and amount of payments to AL employees.

Herzka worked for AL for six months, from December 10, 2001 until June 14, 2002. AL paid Herzka sporadically, and by June 14, 2002, allegedly owed him more than \$45,000 for work he performed and business expenses he incurred. The wages dispute primarily involves four different issues: (1) whether Herzka is entitled to compensation for a trip he and Christensen took to Houston, TX to meet with an AL client, BJ Services; (2) whether Herzka is entitled to a cancellation fee for the Beck case; (3) whether his compensation for work done for Decision Quest ("DQ") should be offset by \$17,760.42 he previously received; and (4) what rights Herzka has in a laptop computer he exchanged with AL. The salient facts of each issue are summarized below.

1. BJ Services

In mid-February 2002, Herzka and Christensen took a trip to Houston, Texas to meet with BJ Services and its attorneys to begin trial preparations. During the trip Herzka and Christensen performed trial preparation work including preparing video clips, meeting with trial attorneys and meeting with representatives of the law firm's clients.⁸ AL did not pay Herzka for any of the time he spent on the BJ Services trip.⁹

⁸ S. Christensen Dep. at 113-19; Herzka Dep. at 135.

⁹ S. Christensen Dep. at 118.

According to Christensen, he told Herzka the trip was not billable because it was an opportunity to meet one of AL's clients.¹⁰ Herzka, however, testified that Christensen told him the BJ Services trip was a billable matter.¹¹

2. The Beck case

The parties contemplated Herzka working on another matter referred to as the Beck case. Ultimately, that case did not go forward, and as a result, AL received a cancellation fee. The parties dispute whether Herzka should receive any part of the Beck cancellation fee. Christensen testified that they had an understanding that Herzka would give all cancellation fees to AL.¹² Herzka denied ever discussing with the Christensens who would get cancellation fees.¹³ In his brief, however, Herzka asserts that because he helped negotiate the fee in the Beck case and was supposed to work on that trial, he should receive the cancellation fee.¹⁴

3. The DQ set-off

On behalf of AL, Herzka worked for DQ in a case involving Astra Zeneca and Lars Bildman from January 3 through January 13, 2002. Problems arose while Herzka

¹⁰ S. Christensen Dep. at 115-16.

¹¹ Herzka Dep. at 135.

¹² S. Christensen Dep. at 192-93.

¹³ Herzka Dep. at 134.

¹⁴ Herzka's Reply Br. in Supp. of his Mot. for Summ. J. ("HRB") at 9.

was working on the DQ project,¹⁵ and DQ did not pay AL everything it was owed for that project.¹⁶ Christensen testified that DQ refused to pay for Herzka's time.¹⁷

On February 25, 2002, AL gave Herzka \$17,760.42 in connection with the DQ project.¹⁸ Herzka characterizes this money as compensation for the DQ project, whereas the Christensens assert that it was merely an "advance" for the work performed on the project and that Herzka's claim should be reduced accordingly.

4. The laptop incident

Herzka purchased a new Sony FX 340 laptop computer on October 9, 2001.¹⁹ On January 10, 2002, Christensen bought a new Sony FX 340 laptop computer nearly identical to Herzka's.²⁰ On January 16, 2002, at AL's request, Herzka sent his laptop computer to Andy Cepregi, an AL employee who needed a laptop for a trial.²¹ The next day Christensen gave Herzka AL's new laptop computer to use until the laptops could be exchanged again.²²

¹⁵ S. Christensen Dep. at 101; Herzka Dep. at 138.

¹⁶ S. Christensen Dep. at 345, 368-69; Herzka Dep. at 138-39.

¹⁷ S. Christensen Dep. at 345.

¹⁸ *Id.* at 345, 368-69; Herzka Dep. at 138-39.

¹⁹ Herzka Aff. ¶ 3.

²⁰ S. Christensen Dep. at 213-14, 305-11; Herzka Dep. at 79-80.

²¹ Herzka Dep. at 157-58.

²² *Id.*; S. Christensen Dep. at 210-11.

On June 6, 2002, after an AL employee had a problem with Herzka's laptop,²³ Christensen telephoned Herzka and requested that they re-exchange laptops.²⁴ Herzka later agreed to exchange the laptops if he could have them side by side so he could transfer data from one to the other computer.²⁵ Shortly thereafter a dispute arose between Herzka and Christensen. Christensen told the AL manager that Herzka no longer worked there and instructed him to change the office locks and computer passwords. Christensen also contacted the police for help in retrieving the laptop.²⁶

After these disputes, on June 14, 2002, Christensen told Herzka that AL would not pay the wages and expense reimbursements he alleged it owed him. In response, Herzka quit his job with AL and, on June 20, 2002, filed a claim for his unpaid wages and expenses with the Delaware Department of Labor. While that claim was pending, AL commenced this suit.

B. Procedural History

AL filed this action against Herzka and W. Byron Poland on July 30, 2002. The complaint alleged that after Herzka and Poland left their jobs with AL they engaged in: (1) misappropriation of trade secrets, (2) deceptive trade practices, (3) breach of oral contracts, (4) tortious interference with prospective business or contractual relations, (5) breach of fiduciary duties and (6) conversion. Additionally, AL claimed that Herzka had

²³ McCroskey Dep. at 10-12.

²⁴ Herzka Dep. at 176-78.

²⁵ S. Christensen Dep. at 246.

²⁶ *Id.* at 244-47, 262-65.

been an independent contractor rather than an employee of AL, and sought a declaratory judgment to that effect.

On August 14, 2002, Herzka and Poland filed an answer denying AL's claims. Herzka also counterclaimed against AL and asserted a third party complaint against Christensen for unpaid wages and expenses under theories of breach of contract, unjust enrichment and violation of the DWPCA.

Defendants moved for summary judgment on February 7, 2003. On February 13, 2004, well after briefing had been completed on the motion for summary judgment, the Bayard Firm moved to withdraw from its representation of AL and Christensen due to their alleged nonpayment of the firm's fees. The Court granted that motion and on March 10, 2004, new counsel, Connolly Bove Lodge and Hutz ("CBLH"), entered its appearance on behalf of AL, but not Christensen.

Christensen then requested a stay on the ground that he was on active military duty in Kuwait. On August 20, 2004, over Herzka's objection, the Court granted Christensen's motion and ordered him to advise the Court and parties of his status at the end of 2004 and also upon his release from active duty. Although Christensen was released from active military duty in March 2005 and returned to Delaware, he did not advise the parties or the Court of his status. In May 2005, however, Herzka saw Christensen in Delaware and asked for a status conference.

In a telephone conference on May 25, 2005 CBLH informed the Court and Defendants for the first time that it represented Aztec Copies, LLC, rather than AL, and intended to move to withdraw from the case, leaving AL unrepresented. The Court held

a further teleconference on June 15, 2005 to consider CBLH's motion. Erica Finnegan, Esquire, of Cross & Simon, participated on behalf of Christensen. Both Christensen and Aztec (through its counsel, CBLH) disclaimed any current ownership interest in AL. Aztec claimed that it never officially merged with AL and did not file a certificate of merger with the Delaware Secretary of State.

After the teleconference the Court entered an order on June 15, 2005, permitting CBLH to withdraw and giving AL 30 days to have new counsel enter their appearance or risk entry of an adverse judgment against it. No new counsel has ever appeared for AL.

On July 29, 2005, the Court granted a motion by Defendants for dismissal of AL's claims and entry of judgment against AL pursuant to Rule 41(b). The Court's Order stated that AL was to pay Herzka \$49,253.50 for unpaid wages and expenses and an additional \$49,253.50 in liquidated damages under the DWPCA. The Order also imposed liability on AL for Herzka's reasonable attorneys' fees and costs in an amount to be determined after resolution of Herzka's claims against the Christensens.

On August 4, 2005, the Court heard argument on Herzka's motions to add Mrs. Christensen as an additional defendant and for summary judgment against the Christensens. On August 8, 2005, the Court granted Herzka's motion to add Mrs. Christensen as a defendant and denied without prejudice his motion for summary judgment. Herzka promptly filed an Amended Answer and Counterclaims, and the Christensens each filed replies. On December 14, 2005, Herzka renewed his motion for summary judgment against the Christensens. This is the Court's opinion on that motion.

II. ANALYSIS

A. Standard

Under Court of Chancery Rule 56, the Court will grant summary judgment only when the parties do not dispute any issue of material fact and the moving party is entitled to judgment as a matter of law.²⁷ The Court must view the facts in the “light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that there is no material question of fact.”²⁸ On the other hand, a party opposing summary judgment “may not rest upon the mere allegations or denials of [their] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial. If [the party] does not so respond, summary judgment, if appropriate, shall be entered against [them].”²⁹ The Court “also maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application.”³⁰

B. Affect of the July Order

Herzka asserts that the doctrines of law of the case and collateral estoppel bar the Christensens from contesting the following conclusions of fact and law implicit in the Court’s July Order granting judgment against AL: (1) Herzka and Poland did not

²⁷ Ct. Ch. R. 56(c); *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).

²⁸ *Tanzer v. Int’l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

²⁹ Ct. Ch. R. 56(e).

³⁰ *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000).

misappropriate trade secrets, engage in deceptive trade practices, breach any contracts with AL, engage in tortious interference with AL's prospective business or contractual relations, breach their fiduciary duties, or convert any AL property; (2) Herzka was AL's employee under the DWPCA; (3) AL owes Herzka \$49,253.50 for wrongfully failing to pay him wages and reimburse his business expenses and an equal amount in liquidated damages under the DWPCA because AL had no legal justification for withholding those payments; and (4) AL must pay Herzka's reasonable attorneys' fees incurred in this litigation.³¹

The Christensens assert that these doctrines do not apply to them in the circumstances of this case. They further contend that they retain the right to litigate a number of questions, including: (1) whether Herzka was an employee of AL; (2) whether the amounts sought by Herzka were actually "wages" within the meaning of the DWPCA; (3) whether Herzka is entitled to recover liquidated damages or attorneys' fees from them personally under the DWPCA; and (4) whether Mrs. Christensen was a managing agent of AL within the meaning of the DWPCA.

1. Applicability of the doctrine of the law of the case

Herzka asserts that the law of the case bars the Christensens from relitigating certain defenses to Herzka's counterclaims, because AL abandoned its claims and defenses and this Court entered judgment against AL in the July Order. The Christensens respond that the law of the case does not apply because they did not actually litigate any

³¹ HRB at 11-12.

such legal or factual issues. Furthermore, they contend that applying the law of the case to them would be unfair because AL did not adequately represent their interests and Mrs. Christensen was not a party to the case at the time of the July Order.

The law of the case is established “when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation.”³² Thus, “once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.”³³

The law of the case doctrine is neither inflexible nor an absolute bar to reconsideration of a prior decision that is “clearly wrong, produces an injustice, or should be revisited because of changed circumstances.”³⁴ An important distinction between the law of the case doctrine and *res judicata* or claim preclusion is that the “law of the case does not have the finality of *res judicata* since [the law of the case doctrine] only applies

³² *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990).

³³ *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003) (internal quotations omitted).

³⁴ *Hamilton v. State*, 831 A.2d 881, 887 (Del. 2003) (there are two exceptions to the law of the case doctrine: when “the previous ruling was clearly in error or there has been an important change in circumstances,” or when “the equitable concern of preventing injustice” trumps the doctrine); *Gannett Co. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000).

to litigated issues and does not reach issues which could have been but were not litigated.”³⁵

The Christensens contend that *Insurance Corp. v. Barker*³⁶ stands for the proposition that the law of the case doctrine only applies if an *appellate court* makes or affirms conclusions of law or fact. That is not correct.³⁷

As this Court recently held in *Taylor v. Jones*,³⁸ the law of the case doctrine requires that issues already decided by a court generally should be adopted by that same court in later proceedings in the same case without relitigation. Thus, in *Taylor v. Jones*, the Court declined to reopen its prior ruling on summary judgment that petitioner could proceed on a resulting trust theory based on arguments advanced by respondent in later post-trial proceedings. There, as with the July Order in question here, the earlier ruling had not been appealed. As *Taylor v. Jones* illustrates, however, that fact alone does not preclude this Court from treating the July Order as the law of this case. Rather, the Court retains its discretion to determine whether the law of the case doctrine applies to specific issues.³⁹

³⁵ *Ins. Corp. of Am. v. Barker*, 628 A.2d 38, 41 (Del. 1993) (internal quotations omitted).

³⁶ *Id.* at 40.

³⁷ *May*, 838 A.2d at 288 n.8 (holding that the law of the case doctrine applies to earlier decisions of a court in the same case).

³⁸ 2006 WL 1510437, at *5 (Del. Ch. May 26, 2006).

³⁹ *Barker*, 628 A.2d at 41. *See Rishell v. Jane Phillips Episcopal Mem’l Med. Ctr.*, 94 F.3d 1407, 1410 (10th Cir. 1996) (The law of the case doctrine does not

The law of the case only applies to reconsideration of *legal* issues.⁴⁰ Hence, it does not apply to factual questions. In this case the Christensens seek to litigate several factual disputes. In particular, they seek a determination of whether Herzka was an employee of AL or an independent contractor,⁴¹ the proper amount of Herzka's wage claim, whether Herzka is entitled to liquidated damages under the DWPCA, and whether Mrs. Christensen was a managing agent of AL.⁴²

Furthermore, the July Order did not explicitly address the underlying issues relating to either AL's dismissed claims or the judgment against AL on Herzka's counterclaims. Rather, I entered judgment against AL because it "voluntarily abandoned its prosecution of the case and the defense of Herzka's counterclaims." Federal courts have held that the law of the case doctrine does not apply to default judgments.⁴³ Although this case technically involves a voluntary abandonment of claims rather than a

prevent a court from re-deciding an issue unless an appellate court has ruled on the merits of the claim sought to be precluded.).

⁴⁰ *Izquierdo v. Sills*, 2004 WL 2290811, at *4 n.28 (Del. Ch. June 29, 2004) ("The law of the case doctrine applies as a constraint to reconsideration of *legal* issues.").

⁴¹ *E.I. du Pont de Nemours & Co. v. Griffiths*, 130 A.2d 783, 784-85 (Del. 1957) (independent contractor question almost entirely one of fact); *Vandiest v. Santiago*, 2004 WL 3030014, at *5 (Del. Super. Dec. 9, 2004) (in cases at law the question of whether someone was an independent contractor or an employee is a question of fact to be decided by the jury).

⁴² Determining whether Herzka can receive liquidated damages under the DWPCA requires the Court to decide whether the Christensens had reasonable grounds to dispute his claim. This will require the Court to engage in an extensive factual inquiry into the particulars of Herzka's employment.

⁴³ *Assoc. Int'l Ins. v. Crawford*, 182 FRD 623, 629 (D. Colo. 1998).

default judgment, the same reasoning applies. In both situations, the court is not called upon to fully address the issues of the case on the merits. Additionally, AL, not the Christensens, voluntarily abandoned its claims and the defense of the counterclaims.

I am not convinced that applying the law of the case under these circumstances would be appropriate. First, it is important to distinguish the two aspects of the July Order: (1) the dismissal of AL's claims and (2) the entry of judgment against AL on Herzka's counterclaims. Defendants premised their motion for the July Order on Court of Chancery Rule 41(b) regarding "[i]nvoluntary dismissal" of claims. Rule 41(b) unquestionably applies to the dismissal of AL's claims for "failure of the plaintiff to prosecute or to comply with these Rules or any order of court." Defendants argued that AL failed to comply with the Court's June 15, 2005 Order directing it to have new counsel enter an appearance within 30 days. In his motion for summary judgment, Herzka emphasizes the language in Rule 41(b) that "a dismissal under this paragraph . . . operates as an adjudication on the merits." Thus, AL would be precluded from asserting any of its affirmative claims against Herzka again. Moreover, under principles of *res judicata* and privity, the Christensens arguably might be precluded from ever pursuing a claim against Herzka for affirmative relief based on any of the claims abandoned by AL, such as misappropriation of trade secrets or conversion. That is not what the Christensens seek to do here, however. Instead, they have raised issues germane to certain of AL's former claims only by way of defense to Herzka's counterclaims for wages and expenses.

The defensive nature of the issues the Christensens seek to preserve requires greater focus on the second aspect of the July Order. That is the judgment entered against AL on Herzka's DWPCA counterclaims. According to Herzka, there are numerous factual and legal conclusions implicit in that judgment. The question then is what effect those conclusions should be given vis á vis the Christensens. In my opinion, the answer is none.⁴⁴

The reasons for that conclusion are several. First, Rule 41(b)'s application to the entry of judgment in favor of a claimant like Herzka is reasonably open to question. In many respects, the second aspect of the July Order is more akin to a default judgment under Rule 55(b). As previously noted, however, some courts have refused to accord law of the case or collateral estoppel effect to default judgments. Furthermore, Defendants elected to proceed in a very summary fashion and under Rule 41(b); thus, they should bear the effect of any infirmity in that procedure. Finally, the conduct that led to entry of the July Order, *i.e.*, AL's failure to obtain new counsel within an approximately six week period, although noncompliant, cannot be said to have been egregious. Nor is it clear that the Christensens can be faulted for AL's inaction in that they disclaimed any ownership of AL at the relevant time.

⁴⁴ In so holding, I do not suggest that the Christensens' conduct in this litigation deserves special consideration. Likewise, the Court expresses no opinion as to whether Scott or Jennifer Christensen or both might be subject to liability as a result of the judgment against AL based on some other theory not presently before the Court, such as piercing the corporate veil.

For all of these reasons, the Court holds that the law of the case doctrine provides no basis for precluding the Christensens from defending against Herzka’s DWPCA and related counterclaims.

2. Applicability of the doctrine of collateral estoppel

Herzka also contends, in the alternative, that even if the pending summary judgment motion were not part of the same case as the July Order, “the Christensens would be bound by the July Order under the doctrine of collateral estoppel.”⁴⁵ I find this argument somewhat baffling because the July Order unquestionably is part of the same case. Further, Herzka himself describes the doctrine of collateral estoppel as providing that, “where a question of fact essential to the judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the same parties in a subsequent case on a different cause of action.”⁴⁶ The July Order does not constitute a final judgment. By its terms, the Order applies only to the claims asserted by, and the counterclaims against, AL, not to all claims. Indeed, the last sentence of the Order states, “Defendants may file a motion for attorneys’ fees and costs after Herzka’s claims against Jennifer and Scott Christensen have been resolved.” Thus, the interlocutory nature of the Order is clear on its face.⁴⁷

⁴⁵ Defendant Herzka’s Opening Br. in Supp. of his Mot. for Summ. J. (“HOB”) at 13 (initial capitals omitted).

⁴⁶ *Id.* (quoting *Columbia Cas. Co. v. Playtex F.P., Inc.*, 584 A.2d 1212, 1216 (Del. 1991)).

⁴⁷ No effort has been made to render the July Order final under Rule 54(b).

In his summary judgment motion, Herzka invokes the doctrine of collateral estoppel to support giving issue preclusive effect to the partial judgment (against AL only) reflected in the July Order against the Christensens in this very case. Because there is only one case involved here and the July Order is not a final judgment,⁴⁸ the Court concludes that collateral estoppel has no application to the issues raised in Herzka's motion for summary judgment.

A few other considerations buttress this conclusion. Even if, as Herzka hypothetically posits, one somehow could view the July Order as a final judgment and the remaining counterclaims against the Christensens as equivalent to a subsequent action, Herzka still would have to demonstrate the existence of the required elements for collateral estoppel. Thus, Herzka would have to show that: (1) the issue previously decided is identical to the present issue; (2) the issue was fully adjudicated on the merits; (3) the parties against whom the doctrine is invoked (the Christensens) were parties to the litigation or in privity with a party to the prior litigation; and (4) the parties against whom the doctrine is raised had a full and fair opportunity to litigate the issue.⁴⁹ As detailed in the Christensens' brief, serious questions exist regarding at least the second and third of these requirements.⁵⁰ For example, the Christensens argue that an adjudication on the merits pursuant to Rule 41(b) is not an adjudication on the merits for purposes of

⁴⁸ See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

⁴⁹ *Columbia Cas. Co.*, 584 A.2d at 1216.

⁵⁰ See Christensens' Ans. Br. in Opp. To Def. Herzka's Mot. for Summ. J. ("CAB") at 19-24.

collateral estoppel. Herzka disputes that proposition, arguing that the July Order was based on Rule 41(b) which dictates that the dismissal be treated as “an adjudication on the merits.”

Although Rule 41(b) requires that the dismissal of AL’s claims under the July Order operate as an adjudication upon the merits that does not mean it deserves collateral estoppel effect. A valid and final personal judgment is one which reaches and determines the real or substantial grounds of the action or defense as distinguished from matters of practice, procedure, jurisdiction or form.⁵¹ Thus, a judgment in a prior action will not serve as a bar to a second suit if the first suit was dismissed for a defect of pleadings, parties, want of jurisdiction, or some other ground which did not go to the merits of the action.⁵² The dismissal in the July Order did result from such a nonsubstantive deficiency.

Herzka relies on *George v. Martin*⁵³ for the proposition that collateral estoppel applies to a dismissal under Rule 41(b). In *George*, however, the court applied the doctrine of claim preclusion,⁵⁴ not issue preclusion or collateral estoppel.⁵⁵ In fact the

⁵¹ *Trans World Airlines, Inc. v. Hughes*, 317 A.2d 114, 119 (Del. Ch. 1974).

⁵² *Id.*

⁵³ 2001 WL 1568480 (Terr. V.I. Oct. 29, 2001).

⁵⁴ Delaware courts have used the terms *res judicata* and claim preclusion interchangeably and distinguish them from collateral estoppel and issue preclusion. The RESTATEMENT (SECOND) OF JUDGMENTS also contrasts claim preclusion and the narrower concept of issue preclusion. The section on Scope states: “The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually

court distinguished collateral estoppel from claim preclusion and held that “[s]ubsequent suits involving claims dismissed under Rule 41(b), operating as an adjudication upon the merits, are *limited to claim preclusion* because there was never any prior litigation of the issues.”⁵⁶ Because the issues the Christensens seek to litigate in defense of Herzka’s counterclaims were not fully addressed on the merits in the July Order, it cannot support Herzka’s argument for collateral estoppel in the context of his motion for summary judgment.

C. Are Mr. and Mrs. Christensen Personally Liable to Herzka under the DWPCA as AL’s Officers or Managing Agents?

Herzka contends that he is entitled to summary judgment on his DWPCA claim because there can be no doubt that Christensen, who was AL’s president and sole owner during the period of Herzka’s employment, knowingly permitted AL not to pay him. Further, Herzka asserts that there is ample evidence to hold Mrs. Christensen personally liable because she also managed AL.

ought not to have another chance to do so. A related but narrower principle—that one who has *actually litigated* an issue should not be allowed to relitigate it—underlies the issue of issue preclusion.” (Emphasis added).

⁵⁵ *George*, 2001 WL 1568480, at *3.

⁵⁶ *Id.* (emphasis added). See *In re Pyramid Energy, Ltd.*, 160 B.R. 586, 590 n.3 (Bkrtcy. S.D. Ill. 1993) (citing *In re Randa Coal Co.*, 128 B.R. 421, 427 (W.D. Va. 1991)) (“[A] Rule 41(b) dismissal is not sufficient for application of collateral estoppel or issue preclusion.”); *Kern v. Hettinger*, 303 F.2d 333, 340-41 (2d Cir. 1962) (“[W]e see no indication that any jurisdiction would find collateral estoppel applicable where, as here, the issues involved in the present suit were not clearly decided by the prior judgment” which was a dismissal for lack of prosecution.).

The Christensens respond that Herzka is not entitled to summary judgment on his wage claim because there are disputed issues of material fact and law, including: (a) whether Herzka was an independent contractor or an employee of AL; (b) the amount of Herzka's claim; (c) whether Mrs. Christensen was a manager of AL; and (d) whether Herzka should receive liquidated damages because the Christensens lacked reasonable grounds for disputing his claim.

The DWPCA provides that: "For the purpose of this chapter the officers of a corporation and any agents having the management thereof who knowingly permit the corporation to violate this chapter shall be deemed to be the employers of the employees of the corporation."⁵⁷ Material issues of fact exist as to each of the questions the Christensens identified.

1. Was Herzka an independent contractor or an employee of AL?

The Christensens argue that they cannot be held liable under the DWPCA because Herzka was not an employee under the Act. Herzka contends otherwise primarily because AL retained control over the means and methods by which he performed his work and taxed Herzka's earnings in the same manner as its other employees.

The General Assembly enacted the DWPCA to provide for payment of employees' wages and to enforce collection.⁵⁸ Under § 1101(a)(4) an "employee" is "any person suffered or permitted to work by an employer under a contract of employment

⁵⁷ 19 *Del. C.* § 1101(b).

⁵⁸ *Kutney v. Saggese*, 2002 WL 1463092, at *1 (Del. Super. July 8, 2002).

either made in Delaware or to be performed wholly or partly therein.” Courts must decide whether a person is an employee for purposes of the DWPCA on a case by case basis.⁵⁹ Three criteria to be considered in such a determination are: (1) whether the employer retained control over the means and methods of doing the work; (2) whether the person was taxed like an employee; and (3) whether other benefits consistent with a standard employment contract were provided.⁶⁰

The Christensens point to several facts which, when viewed in the light most favorable to them, present questions of material fact as to whether Herzka was an independent contractor. In particular, the Christensens aver that Herzka effectively told at least two other people that he was a contractor of AL,⁶¹ AL paid Herzka at an hourly rate of \$90 whereas AL employees were paid at a lower rate⁶² and, when Herzka worked

⁵⁹ *Kutney*, 2002 WL 1463092, at *1.

⁶⁰ *Fairfield Builders, Inc. v. Vattilana*, 304 A.2d 58, 60 (Del. 1973); *Rypac Packaging Mach. Inc. v. Coakley*, 2000 WL 567895, at *13 (Del. Ch. May 1, 2000).

⁶¹ Cindy Langan, a former independent contractor for AL testified that “I had a conversation with Messrs. Herzka and Poland during which Herzka humorously remarked that ‘we’re all subcontractors of subcontractors of subcontractors.’” Langan Aff. ¶ 1. Similarly, Stephen A. Basilio, one of AL’s potential investors, testified that “[w]hile at AL’s office, I met Jeffrey Z. Herzka, who informed me (i) that he and Christensen were partners; and (ii) that any equity investment would have to be approved by him because he was Christensen’s partner. I told Herzka that it was my understanding that Christensen was the sole owner of AL. In response, Herzka stated that he was ‘contracting through’ Christensen and that an equity ownership for him was ‘in the works.’” Basilio Aff. ¶¶ 2-3.

⁶² CAB Ex. L; S. Christensen Dep. at 185-86; *Rocha v. Keka Const., Inc.*, 2005 WL 791362, at *4 (Del. Super. Mar. 31, 2005) (fact that an individual was paid hourly or per job supported a finding that he was an independent contractor).

on a trial, the client and not AL directly supervised his work.⁶³ An evidentiary dispute also exists as to whether Herzka was taxed as an employee because he was in fact an employee or solely for his convenience. Consequently, the issue whether Herzka was an employee of AL cannot be resolved on summary judgment.

**2. Factual disputes preclude summary judgment on
the amount of Herzka's claim**

Assuming Herzka succeeds in proving he was an employee of AL, he still would have to prove the amount of his claim. Herzka contends the record supports summary judgment on that issue. The Christensens dispute that contention. Having considered the parties' submissions and arguments, the Court concludes that a number of factual disputes make summary judgment inappropriate as to the amount of Herzka's wages claim.

Examples of those disputes include the existence of genuine issues of material fact as to whether Herzka performed any compensable work for AL on the BJ services case, whether Herzka has a valid claim to the cancellation fee in the Beck case and, in any event, whether such a fee would constitute "wages" under the DWPCA. The dispute among the parties regarding work and payments relating to the Decision Quest matter also raises issues of material fact.

⁶³ Herzka Dep. at 156 ("when you're working a trial, you're supervised directly by the client").

Similarly, I find that there are genuine issues of material fact pertaining to Herzka's claim against the Christensens for liquidated damages and attorneys fees under the DWPCA.

Section 1103(b) provides:

If an employer, without any reasonable grounds for dispute, fails to pay an employee wages, as required under this chapter, the employer shall, in addition, be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller⁶⁴

Thus, if the Christensens had reasonable grounds for disputing Herzka's claim, they will not be liable for liquidated damages.

The Christensens claim reasonable grounds for disputing the amount owed Herzka because: (1) Herzka refused to return the laptop; (2) there was a good faith dispute about the amount Herzka was owed; (3) there was a good faith dispute about Herzka's status as an employee; and (4) Herzka breached his fiduciary duties and engaged in other wrongful acts. Herzka disputes these arguments, and the evidence presented on his motion for summary judgment indicates that each of them involves issues of material fact. Therefore, the Court also denies summary judgment on Herzka's claim for liquidated damages and attorneys' fees.

⁶⁴ 19 *Del. C.* § 1103(b).

3. Was Mrs. Christensen a manager of AL?

Herzka contends that Mrs. Christensen was a manager of AL and therefore is subject to personal liability under 19 *Del. C.* § 1101(b). In support of his argument, Herzka submitted evidence that Mrs. Christensen handled the company's finances, received a salary of \$52,000 per year, generated and occasionally signed paychecks and had discretionary spending power. The Christensens deny that Mrs. Christensen was a manager of AL or was involved in making business decisions for AL. In fact, they urge entry of summary judgment on this issue in their favor.

Black's Law Dictionary defines a manager as "[a] person who administers or supervises the affairs of a business, office, or other organization."⁶⁵ In this case both sides have presented sufficient evidence to create a factual dispute regarding whether Mrs. Christensen had sufficient authority over the affairs of AL to make her a manager under § 1101(b). The Court cannot resolve this dispute on a motion for summary judgment.

III. CONCLUSION

For the reasons stated, the Court DENIES Herzka's motion for summary judgment.

IT IS SO ORDERED.

⁶⁵ Black's Law Dictionary (8th ed. 2004).